United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL MEMORANDUM

76-7426

In The

United States Court of Appeals

For The Second Circuit

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RAYMOND G. LASKY, NICHOLS ZACHARY, HAROLD HOWARD, CLAYTON FISHBURN, RICHARD HARLAND, AND THE PRE-TRIAL DETAINEES,

Plaintiffs-Appellees,

-against-

SHERIFF LAWRENCE QUINLAN,

Defendant-Appellant,

-and-

SERGEANT FARMER, JAILERS BOYCE, A. SMITH, CALLUIAN, THE COUNTY OF DUTCHESS, EDWARD C. SCHUELER, Individually And As the County Executive Of Dutchess County, STANLEY T. WARYAS, LOUIS FOERSCHLER, PAUL E. PFUETZE, JEAN C. MURPHY, LOUIS A. DEBIASE, ROBERT ROBAR, JOSEPH V. POILLUCCI, JOHN ARMSTRONG, G. DONALD FINNAN, JUDITH BLEAKLEY, ROCCO T. DIGILIO, MARCO CAVIGLIA, ARNOLD L. BARATTA, ROSALIE HODAS, JACK I. DEXTER, CHARLES MILLER, GLENN E. WARREN, CLIFFORD S. McMULLEN, DOUGLAS A. McHOUL, ROBERT HORTON, DANIEL J. HANNIGAN, JOSEPH J. LOMBARDI, GORDON WRIGHT, KENNETH UTTER, RICHARD H. WYMAN, MARGARET G. FETTES, RALPH VINCHIARELLO, WILLIAM E. BARTLETT, CLYDE R. CHASE, LUCILLE P. PATTISON, ASHEIGH M. LOSEE AND CALVIN R. SMITH, Each Individually And As Members of The Dutchess County Legislature,

Defendants.

SUPPLEMENTAL MEMORANDUM FOR APPELLANT

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STATEMENT OF FACTS

This memorandum is submitted, by consent of this Court, as a supplement to the oral argument of this appeal had on June 8, 1977.

This action was initiated in 1973 by the named plaintiffs, pro se, seeking certain injunctive relief with respect to the conditions at the Dutchess County Jail. The named plaintiffs sought class certification. The attorney for the plaintiffs drew a Stipulation which was signed by Sheriff Quinlan's attorney. The Stipulation was submitted to the District Court below for approval. The Court, by the Hon. Murray Gurfein, D.J., reviewed and accepted the Stipulation, and in his Order specifically denied class action status (Appendix, p. 82a). At oral argument, it was reported to the Court by counsel for appellee-inmates that none of the named plaintiffs were still confined at the jail at the time the contempt motion was made in 1975. Of course, none of these plaintiffs were still confined at the jail at the time of this appeal.

QUESTION RAISED ON APPEAL

The question thus raised is whether the cases of the individually named plaintiffs are moot, and, if so, the effect of such mootness on the proceedings in the Court below. It is respectfully submitted that at the time that this matter was "revived" in the Court below the case was moot for want of a case or controversy and for want of a real party in interest. It is therefore submitted that the contempt proceedings were conducted without jurisdiction. The judgment of the Court below should accordingly be vacated and set aside.

I. There Must Exist a "Case or Controversy" At All Stages of the Litigation, for the Court to Have Jurisdiction of the Matter.

There is little need for extensive citation of authorities to establish the principle that a "case or controvery" must exist at all stages of the litigation, and not merely at the time the complaint is filed, Golden v. Zwickler, 394 US 103, 89 SCt 956, 22 LEd^2 113 (1969). Thus, it is the duty of the federal courts:

> "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Mills v. Green, 159 US 651, 16 SCt 132, 40 LEd 293 (1895, at 159 US 653)

The inability of federal courts to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of the judicial power depends upon the existence of a case or controvery, Liner v. Jafro, Inc., 395 US 301, 84 SCt 391, 11 LEd^2 347 (1964). "Simply stated a case is moot when the issues presented are no longer 'live' or where the parties lack a legally cognizable interest in the outcome", Powell v. Mc Cormack, 395 US 486, 89 SCt 1944, 23 LEd^2 491 (1969, at 395 US 496).

II. The Cases of Each of the Individually Named Plaintiffs Was Rendered Moot Upon the Termination of Their Confinement At the Dutchess County Jail.

At the time of the contempt motion, none of the named plaintiffs were still confined at the Dutchess County Jail. It is manifest, therefore, that the plaintiffs were not subject to the alleged circumstances at the jail, and were not injured by the alleged failure of those circumstances to measure up to the Stipulation and Order. Since they suffered no injury, the named plaintiffs

lacked standing to question the Sheriff's compliance with the Order, LaReau v. Manson, 383 F Supp 214 (D.Conn., 1974); see also Russell v. Henderson, 475 F^2 1138 (5th Cir., 1973); Bryant v. Blackwell, 431 F^2 1203 (5th Cir., 1970); Allen v. Likins, 517 F^2 532 (8th Cir., 1975).

III. In the Absence of Class Certification, Mootness of the Claims of the Named Plaintiffs Renders the Entire Action or Proceeding Moot.

Several recent decisions, including several from the United States Supreme Court, make clear that once the claim of the named plaintiffs becomes moot, the entire case, absent a valid and proper class certification, also becomes moot.

In Pasadena City Board of Education v. Spangler, ___ US ___, 96 SCt 2697, 49 LEd^2 599 (1976), the Court was confronted with a school desegragation case initiated in 1968. The action was started by several students and their parents, and filed by them as a class action. The students prevailed on the merits, but at no time was there certification of the class as required by Fed. R. Civ. Proc. 23 (49 LEd^2 599 at 605). School officials thereafter sought relief from an Order entered by the District Court on several grounds, including mootness based upon the fact that all the original student plaintiffs had since graduated from the school system, and there had never been a Rule 23 class certification. The claim of mootness was opposed by plaintiffs'attorneys on the grounds that the litigation was filed as a class action and had been treated by the parties as a class action, and that failure to obtain certification was merely the absence of a "verbal recital" which was meaningless in the case at bar. The Court rejected those arguments, noting:

> "But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation. Except for the intervention of the United States, we think the case would be clearly moot." (49 LEd^2 599 at 605).

A similar decision was reached in 1975 by the Supreme Court in The Board of School Commissioners of the City of Indianapolis, et. al. v. Jacobs, 420 US 128, 95 SCt 848, 43 LEd^2 74 (1975). There, six plaintiffs brought an action to have declared unconstitutional certain regulations of the School Board allegedly affecting first amendment rights. At oral argument, the Court was informed that all plaintiffs had since graduated from the school (and thus were no longer subject to the regulations). The Court held:

> "in these circumstances, it seems clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue. The case is therefore moot unless it was duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23,...." (43 LEd^2 74 at 78, emphasis added).

In noting that there existed no proper class certification, the Court stated:

> "The need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as to the initially named plaintiffs prior to the exhaustion of appellate review. Because the class action was never properly certified nor the class properly identified by the district court, the judgment of the court of appeals /affirming the district court/ is vacated..." (id.)

It is noteworthy that Justice Douglas, in a dissenting opinion, points out that this decision was made even though the Court of Appeals apparently did not even consider the mootness question (ibid., dissenting opinion, Douglas, J., fn. 4).

In Allen v. Likins, 517 F^2 532 (8th Cir., 1975), the plaintiff, a prison inmate, challenged the constitutionality of a statute affecting the status of children of incarcerated parents. Upon her release from prison and regaining custody of her children, the district court dismissed her claims as moot. On appeal, the Court of Appeals held:

> "We recognize that a class action may continue to be a "case" or "controversy" under Art III and the Declaratory Judgment Act if the claim of the named plaintiff becomes moot after class certification...Here, of course, the named plaintiff's claim became moot before the district court had certified the case as a class action pursuant to Fed. R. Civ. Proc. 23(c). Thus, the dismissal of the entire action must be affirmed unless the district court failed to rule on plaintiff's motion for class certification 'as soon as practicable after commencement of the action' as is required by Rule 23(c)." (517 F^2 532 at 535)

Of course, in the case presently before this Court, the district court expressly and specifically denied certification, as noted above, rather than merely not ruling on the motion for class action status.

Again, the Supreme Court considered the doctrine of mootness as it applies to class actions, and possible exceptions to the mootness doctrine, in Weinstein v. Bradford, 423 US 147, 96 SCt 347, 46 LEd^2 350 (1975). There, an inmate sued the Board of Parole and claimed certain procedural rights in considering his parole eligibility were violated. Class action status was sought, but the district court refused to certify and dismissed the complaint. The Court of Appeals sustained plaintiff's claim on the merits, but the Supreme Court

vacated that decision on the ground of mootness. The Court noted that plaintiff had been temporarily paroled, then permanently released, and "from that date forward it is plain that respondent /i.e. plaintiff/ can have no interest whatever in the procedures followed by petitioners in granting parole" (46 LEd^2 350 at 352). Citing Sosna v. Iowa, 419 US 393, 95 SCt 553, 42 LEd^2 532 (1975), the Court noted that in the absence of a class action, the "capable of repetition, yet evading review" doctrine is limited to where: (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. The Court ruled that the second test was clearly not met, stating:

> "While petitioner's will continue to administer the North Carolina Parole system with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent /i.e., plaintiff/ will again be among that number." Weinstein v. Bradford, supra, 46 LEd^2 350 at 352; see also O'Shea v. Littleton, 414 US 488, 94 SCt 669, 38 Ed^2 674 (1974).

Clearly, it can not reasonably be demonstrated that the named plaintiffs in the instant case will again be among the number of inmates at the Dutchess County Jail. The second test in the "capable of repetition, yet evading review" is not met, and therefore this exception to the mootness doctrine is inapplicable to the case at bar.

From the foregoing, it is clear that claims of the individually named plaintiffs became moot upon the termination of their confinement at the Dutchess County Jail. Neither of the two generally recognized prerequisites to exception from the mootness doctrine are applicable here. It is therefore respectfully submitted that the entire action has been rendered moot, and accordingly the proceedings and judgment below should be vacated and set aside.